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venting the unjust enrichment in such a case, than it is in giving relief. It being plain that the one in whom title is vested should not be allowed to keep it for himself, equity looks around for the most appropriate *cestui*. There could be no one more appropriate than the intended beneficiary in the principal case, and, therefore, the original beneficiary should be held as constructive trustee for him.¹⁰

RIGHTS OF A PATENTEE. AGAINST PERSONS INFRINGING HIS PATENT UNDER A CONTRACT WITH THE GOVERNMENT.—The Statute of Monopolies¹ deprived the crown of the right to grant monopolies except in certain cases,—among others, novel and original inventions. From this negative provision has developed the patent law of England, which still retains the character of a monopoly in that the patentee is given a patent, not as a matter of right, but as a favor bestowed by the crown.² The English government, therefore, may make use of a patent without the consent of the patentee and without giving him any compensation therefor.³ In this country, however, the theory is fundamentally different, and a patent is granted as a matter of right rather than of grace.⁴ The patentee is given the right to produce his invention to the exclusion of all others, including the government, and the Supreme Court has not hesitated to say that if the government, in the exercise of its power of eminent domain, makes use of the patent without the consent of the patentee, it should compensate him for such use.⁵

The remedy of the patentee, however, has not been coextensive with the injury occasioned by the infringement. Prior to the Act of June 25, 1910,⁶ he could apply to Congress, he could sue the government in the Court of Claims, or the officers of the government in the district court.⁷ The jurisdiction of the Court of Claims, however, was limited to actions on contracts, express or implied,⁸ and unless he could show that the government had recognized his patent and its validity at the time of the appropriation, his suit failed.⁹ If the appropriation took place in ignorance of his patent, or if the government denied his right, the action was necessarily one sounding in tort,

¹⁰See the article by Prof. Costigan, *supra*.

²¹Jac. 1 (1624).

¹1 Rogers, Patents, 1.

²*Feather v. Queen* (1865) 6 B. & S. 257. The immunity of the Government has not been extended to independent contractors. *Dixon v. London S. A. Co.* (1876) L. R. 1 App. Cas. 632.

⁴*McKeever's Case* (1878) 14 Ct. Cl. 396. U. S. Const., Art. 1, § 8, (8).

⁵*United States v. Burns* (1870) 79 U. S. 246; *Belknap v. Schild* (1896) 161 U. S. 10.

⁶36 U. S. Stat. L. 851.

⁷1 Rogers, Patents, 142.

⁸*United States v. Palmer* (1888) 128 U. S. 262; *Schillinger v. United States* (1894) 155 U. S. 163. The contract must be implied in fact, and not in law. *Russell v. United States* (1901) 182 U. S. 516; *Harley v. United States* (1905) 198 U. S. 229.

⁹*See Hollister v. Benedict Mfg. Co.* (1884) 113 U. S. 59, 67. The rule is the same where the subject matter is land. *United States v. Great Falls Mfg. Co.* (1884) 112 U. S. 645; *Langford v. United States* (1879) 101 U. S. 341.

and he was without remedy against the government although his property had been taken wrongfully.¹⁰ This injustice, which was termed "organized robbery" by Justice Harlan,¹¹ was the cause of the statute above referred to.

As against the agents or officers of the government engaged in the infringement his remedy was also inadequate. They were liable for damages,¹² but where there were large interests concerned a judgment against the officer individually was of little value. If the patentee sought an injunction he was met with the doctrine that an injunction can not be issued against the sovereign,¹³ and it was contended that his suit, though nominally against individuals, was virtually against the United States.¹⁴ This was undoubtedly so where the purpose of the injunction was to effect the use of property already in the possession of the government, although there appears to be some merit in the contention that the rule should not apply where no property of the government is interfered with.¹⁵ If the infringement was effected by an independent contractor, who was to supply the government with the patented articles, the patentee was again, as a rule, restricted to an action for damages, as an injunction would probably interfere with the government.¹⁶

By the act of June 25, 1910,¹⁷ the United States consented to be sued in the Court of Claims in a tort action for the infringement of a patent.¹⁸ The immediate effect of the statute was to give the patentee an adequate legal remedy in every case where the government has made use of his patent, thus removing the only remaining ground for an injunction.¹⁹ But the construction which has been given the statute has had a far more wide-reaching effect. In the recent case of *Marconi Wireless Tel. Co. v. Simon* (D. C., S. D. N. Y., 1915) 54 N. Y. L. J. 671, the defendant, a government contractor, was supplying war vessels with wireless outfits which infringed the plaintiff's patent. The court granted defendant's motion to dismiss on the ground that by virtue of the statute, the United States became a licensee, its use of the patent ceased to be a wrong, and therefore the defendant was supplying lawful goods to a lawful licensee. The result is that the patentee has lost his rights against the individual infringer in such cases, and instead he may always recover from the government. It should be noted that it is not the granting of a new remedy which *ipso facto* destroys the former one, but rather it is the legalizing of the infringement by providing compensation therefor

¹⁰*Forehand v. United States* (1888) 23 Ct. Cl. 477; *Hill v. United States* (1893) 149 U. S. 593.

¹¹Harlan, J., dissenting, in *Belknap v. Schild*, *supra*.

¹²*Forehand v. Porter* (C. C. 1883) 15 Fed. 256; *Head v. Porter* (C. C. 1891) 48 Fed. 481.

¹³*Dashiell v. Grosvenor* (C. C. A. 1895) 66 Fed. 334, *affd.* (1896) 162 U. S. 425; *International Postal Co. v. Bruce* (1904) 194 U. S. 601.

¹⁴See *Belknap v. Schild*, *supra*.

¹⁵*Krupp v. Crozier* (1908) 32 App. D. C. 1.

¹⁶*Brady v. Atlantic Works* (C. C. 1876) 3 Fed. Cas. 1190. The case was reversed in 107 U. S. 192, but on the ground of the invalidity of plaintiff's patent.

¹⁷*Supra*.

¹⁸*Crozier v. Krupp* (1912) 224 U. S. 290.

¹⁹*International C. M. J. Co. v. Cramp & Sons* (C. C. A. 1912) 202 Fed. 932; *Same v. Same* (C. C. A. 1914) 211 Fed. 124.

that has changed the use from an actionable wrong to a justifiable act. Although this interpretation of the statute by the Supreme Court was applied where the defendant was a government officer,²⁰ and not an independent contractor, the distinction, as suggested by the court in the principal case, is without substance, as the license to make the article covers a making by an independent contractor.²¹

ESTOPPEL BY NEGLIGENCE.—Perhaps no single branch of the law of estoppel is as perplexing as so called "estoppel by negligence".¹ Relegated to its proper category this particular sub-division seems to be merely a variety of the more comprehensive species "estoppel by misrepresentation", provided the term misrepresentation be understood to include not merely misrepresentations made by the estoppel-denier in person, but in addition assisted misrepresentations, in which the subsequent change of position on the part of the estoppel-asserter is due partially to the conduct of an intermediary.² The gist of the estoppel is carelessness.³ After considerable discussion in the English courts a rule for determining under what circumstances a person should be estopped because of his careless behavior was formulated by Justice Blackburn,⁴ and this rule has since been adopted in several American jurisdictions.⁵ To raise an estoppel under this rule there is required the presence of three elements: (1) a neglect of some duty owed, to the person misled or to the public in general, obviously, the concomitant of the failure to use due care which must be shown to render a defendant liable in an action for negligence; (2) the neglect must be in the transaction itself; (3) the neglect must be the proximate cause of the estoppel-asserter's change of position.

At first glance this rule appears to be simple and substantially just. Examination of the cases decided under it, however, discloses how rigorously its sections have been construed against estoppel-asserters until "estoppel by negligence", as a practical matter, has been virtually adjudicated out of existence by illiberal application, of the very rules framed to meet situations where want of care on the part of an estoppel-

²⁰Crozier v. Krupp, *supra*.

²¹Foster Hose Supporter Co. v. T. P. Taylor Co. (C. C. A. 1912) 191 Fed. 1003.

¹It may be said that there is often a tendency, due to lapses of close thinking, to obtrude estoppel where it does not belong, merely because the result obtained by following the rules of a different branch of law happens to be identical. See Bigelow, Estoppel (6th ed.) 493, 612-613; Marston v. Allen (1841) 8 M. & W. *494, *504; *cf.* N. Y. & N. H. R. R. v. Schuyler (1885) 34 N. Y. 30. See also in this connection Ewart, Estoppel by Misrepresentation, 104, (2), discussing Goodtitle v. Morgan (1787) 1 T. R. *755, *762; Layard v. Maud (1867) L. R. 4 Eq. *397 and Lloyd v. Jones (1885) 29 Ch. D. 221; and p. 107, (7), discussing Brown v. Read (1875) 79 Pa. 370 and Pennsylvania R. R. Co.'s Appeal (1878) 86 Pa. 80.

²Ewart, Estoppel by Misrepresentation, 100-102. Greene v. Smith (1884) 57 Vt. 268; Van Duzer v. Howe (1860) 21 N. Y. 531.

³Ewart, Estoppel by Misrepresentation, 98-100.

⁴Swan v. No. B. A. Co. (1863) 2 H. & C. *175, *181.

⁵Knox v. Eden Musee (1896) 148 N. Y. 441, 462; Brown etc. Co. v. Howard Fire Ins. Co. (1875) 42 Md. 384; O'Herron v. Gray (1897) 168 Mass. 573.